



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO. 8 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

1. PETER WAFULA MAKOKHA

2. DANIEL WANGILA MASINDE

3. KIZITO SIFUNA MAKOKHA.....ACCUSED

J U D G M E N T

The accused **PETER WAFULA MAKOKHA** (Accused 1) **DANIEL WANGILA MASINDE** (Accused 2) and **KIZITO SIFUNA MAKOKHA** (Accused 3) are charged on two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence in count 1 are that on the 12th day of March, 2018 in Nangwe Location of Bungoma Central sub-County within Bungoma County murdered **JESSE KHAOYA KITELE**.

The particulars of the offence in count 2 are that on the 12th day of March, 2018 in Nangwe location of Bungoma Central Sub County within Bungoma County murdered **FIDELIS BAHATI**.

PW 1 Henry Twitere Wasike was the father to Jessy Khaoya Kitele the deceased in count I. On 12.3.2018 at 5.30 a.m. he received a telephone call from Reuben Wanjala alias Ngombe who informed him that he (Reuben) had sent the deceased to collect a cow from Nangwe to bring it to the slaughter house but had been apprehended by people who wanted to kill him. He went and reported to police who advised them to report to the police at Nalondo police station. While on the way to Nalondo police station, he received information that his son had been killed at Nangwe. He went there. He found his son dead with injuries having severe cut wounds. Police were called and took the body to the mortuary.

PW 9 Reuben Wafula Wanjala who runs a butchery business and had employed the deceased in count 1 testified that on 12.3.2018 at 5 a.m. He received a telephone call from the phone of deceased but the person who spoke was not deceased. The caller informed him that they had apprehended deceased in count 1 with a stolen cow and that they were going to kill him. They went and reported to police together with the father of deceased in count 1. He was later informed that deceased in count 1 had been killed. In cross-examination, he confirmed that he had not sent the deceased anywhere that night.

PW 5 Dennis Wekesa Wafula the Assistant Chief of West Nalondo came at 6.40 am and the caller informed him that a mob had apprehended people who had stolen a cow and wanted to kill him. He called the AP camp and informed them. He proceeded to the scene where he found bodies of 2 people who had been killed. Police had arrived and commenced investigations. At the scene was the cow which had been alleged to have been stolen. On cross-examination, he stated that there were many people at the scene.

PW 8 NO.235509 IP Alex Odugu the OCS Nalondo police station was at the station on 12.3.2018. He received a telephone call from the chief Nangwe location who informed him that 2 people suspected to be cattle thieves had been killed by a mob at Nangwe area. He proceeded to the scene with other officers. On arrival he found 2 bodies Jesse Khaoya (deceased in count 1) and Fidelis Bahati (deceased in count 2). There were in a pool of blood. On inquiries he was informed the alleged stolen cow belonged to accused 1 Peter Khaemba. Accused 1 mentioned accused 2 Daniel Wangila and accused 3 Kizito Sifuna. Accused 1 explained that the 2 deceased had stolen his cow and they had followed the foot marks which led them to Bungoma where they found the 2 deceased with the cow. He arrested accused 1, 2, 3 and took the bodies to the mortuary. He stated that it is 5 people who had apprehended the deceased but he managed to get the 3 accused only. All the 3 accused were at the scene. On being cross-examined he stated that he as the investigating officer did not record a statement from any eye witness.

PW 3 DR. HARUN OMIBAGI produced Post-mortem report prepared by Dr. Wafula who performed the post mortem of the bodies of deceased. On the body of Jesse Khaoya he found he had a cut wound on the skull measuring 5 CM, laceration on back of head and

stab wound on right chest. Upon opening he found deceased had fracture on rib, ruptured spleen and fracture of skull. He formed opinion that the cause of death was due to severe head injury.

On examining the body of Fidelis Bahati the deceased in count 2 he found he had 3 cut wounds on the skull. Multiple rib fractures, cut wound on left hand. Upon opening he found he had a skull fracture, ruptured spleen, rib fracture leading to lung collapse. From the examination he formed opinion that cause of death was due to cardio-vascular arrest secondary to fracture of the head.

Accused gave their sworn defence when placed on their defence, **DW 1 Peter Wafula Makokha** testified that on 12.3.2018 at 12 a.m. he was in his house when he heard the cow's calf making noise outside. He went to check and found the calf alone and the cow missing. He called accused 2, and 3 and informed them. They together started tracking the missing cow. On reaching Bamusi they found 2 people driving the cow. The asked them about the cow, and the 2 people driving the cow said they had bought it from Nangwe market. They said that their boss was Reuben. They volunteered to lead the accused's group to where they had got it from. Many people joined them. The deceased called Reuben who told him he was coming with police. Reuben later switched off his phone and deceased refused to proceed with the journey to where they had got it. Their refusal to move made the people angry who then started assaulting them. He tried to stop them but they refused. Though he was present neither he nor accused 2, 3 assaulted deceased. At 7 a.m. police came and he told them he was the owner of the cow. Police then arrested him and accused 2 and 3.

Accused 2 Daniel Wangila testified that on material night he was woken up by Accused 1 Peter Wafula who informed him that his cow had been stolen. He joined him in tracking the cow with a crowd of about 20 people. They found 2 men driving the cow. Many more people joined them. The deceased agreed to lead the group to where they had got the cow from. On the way they sat down and refused to move. The mob got angry and started beating them until they died. Police came at 7 a.m and found them at the scene. He was then arrested.

Accused 3 Kizito Sifuna Makokha testified that he joined accused 1 and 2 and other people in tracking the accused's cow which had been stolen. He was in another group but were informed they had apprehended the cow and the thieves. He joined their group. The deceased volunteered to show them where they had recovered the cow but on the way refused to move. He tried to restrain them but they refused. Police came and they arrested accused 1, 2, and 3 and were later charged with present offence.

M/S. Wakoli for the accused filed written submissions. She submitted that none of the witness testified having seen any of the accused person assault any of the deceased. All the prosecution witnesses testified that they arrived at the scene and found deceased having been killed. Counsel submitted that the prosecution failed to establish that the 3 accused are the ones who killed the deceased. She submitted that the deceased were killed by a mob despite accused's effort to stop them. The accused are charged with the offence of murder Contrary to Section 203 of the Penal Code.

The Section Reads;

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of the offence of murder”

Section 203 which defines the offence of murder requires proof of the following if the offence of murder is to be established.

- ***malice aforethought on the part of the accused.***
- ***death of the deceased.***
- ***the cause of the death.***
- ***an unlawful act or omission on the part of the accused resulting in the death of the deceased.***

Section 206 of the Penal Code on the other hand defines malice aforethought in the following terms:-

206. Malice aforethought shall be deemed to be established by evidence proving anyone or more of the following circumstances –

- a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;-***
- b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- c) an intent to commit a felony;***
- d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”***

That the two deceased persons died from injuries sustained on the material day is not in dispute. Indeed all the witnesses confirmed that they died at the scene. The fact and cause of death was confirmed by PW3 Dr. Harum Ombingi who produced the post-mortem report in both cases the deceased died as a result of fractures and injuries sustained.

The other issue for determination is whether the accused jointly or severally inflicted the injuries that led to the death of the deceased. None of the 10 prosecutions witnesses called testified as to who assaulted the deceased. Indeed none of the witnesses testified that he saw accused 1, 2, or 3 inflict the injuries on the deceased.

The only evidence tendered against accused 1 is that he was the owner of the stolen cow. The evidence against accused 2, 3 is that they had joined the accused in tracking his stolen cow.

The prosecution only ought to show that since the stolen cow belonged to accused who had called accused 2 and 3 to assist him in tracking it, and the deceased were found with it and were killed, that is enough evidence that it is accused who killed them. That in my view it pedestrian way to prove a charge of murder.

For the prosecution to succeed on a charge of murder it must prove;

- i. that the deceased died, and the cause of death.*
- ii. The unlawful act that caused the death.*
- iii. That it is accused who committed the unlawful act.*
- iv. That the accused committed the offence with malice aforethought.*

None of the above element has been proved against the accused except for the fact and cause of death.

In the premises therefore I am not satisfied that the prosecution has proved its case beyond reasonable doubt. I therefore find Peter Wafula Makokha, (accused 1) Daniel Wangila Masinde (accused 2) and Kizito Sifuna Makokha (accused 2) not guilty of the offence of murder contrary to Section 203 as read 204 of the Penal Code and acquit each of them under section 215 of the Penal Code on Count 1 and Count 2.

I direct that Peter Wafula Makokha (accused 1) Daniel Wangila Masinde (Accused 2) Kizito Sifuna Accused 3) be set at liberty unless otherwise lawfully detained.

DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 3RD DAY NOVEMBER, 2021.

S N RIECHI

JUDGE